

VALIDITY AND REGULARITY: AN HISTORICAL PERSPECTIVE

by

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I: THE TRADITIONAL CATHOLIC DEFINITIONS

The First Thousand Years

The search for a definition of the two terms "validity" and "regularity" is complicated by the fact that the words themselves are not commonly or unequivocally used in the first half of the Christian era. The concepts that these words epitomize, however, were in the process of formation from the early days of the Church's history. Wherever there appears a divergence of opinion on Church discipline, there is likely to be some statement (often divergent ones) on what the Church's ministry is, and on what persons may legitimately be said to exercise it and why. It is to these often rather general statements that we must look for the beginnings of our definitions, remembering at the same time that ecclesiastical polity and discipline was not nearly so sophisticated a thing in these times as it was to become in the latter half of the Christian era, and that to expect a clear-cut post-Tridentine definition of validity in the Fathers is absurd. A series of brief references to the writings of several men in the centuries before Augustine will show something of what I mean.

The letter known as I Clement (to the Corinthians), written about 96 AD, is a beginning for one sort of criteria for true ministry. In Chapter XLIV, 3, we find:

"We consider therefore that it is not just to remove from their ministry those who were appointed by them [the Apostles] or later on by other eminent men, with the consent of the whole Church, and have ministered to the flock of Christ without blame, humbly, peaceably, and disinterestedly, and for many years have received a universally favourable testimony."

Clement is trying to be a peacemaker to a church torn with sedition, and makes a major issue of the peace and charity that should be the common mind and common behavior of members of the Body of Christ. But he also, though in passing, raises the idea of ministers appointed for their tasks in a set fashion by due authority, whose appointment is to be honored.

Ignatius of Antioch (c. 35-107) is more specific than Clement, and is particularly concerned with episcopal jurisdiction:

"In like manner let all men respect the deacons as Jesus Christ even as they should respect the bishop as being a type of the Father and the presbyters as the council of God and as the college of the apostles. Apart from these there is not even the name of a church."¹

Much the same feeling is expressed in his letter to the

Philadelphians, Chapters 3 and 4. In the eighth chapter of his letter to the Smyrnaeans we find:

"Let that be held a valid eucharist which is under the bishop or one to whom he shall have committed it It is not lawful apart from the bishop either to baptize or to hold a love-feast; but whatever he shall approve, this is well-pleasing also to God; that everything which ye do may be sure and valid."

This begins to sound like a hint of the sort of specificity we are looking for.

Didachè, Chapter XV, 1 and 2, says only, "appoint therefore for yourselves Bishops and Deacons worthy of the Lord . . . do not despise them, for they are your honourable men together with the prophets and teachers."

Irenaeus, in Adversus omnes Haereses IV (c. 180) speaks of:

". . . the ancient system of the Church in all the world, and the character of the body of Christ, according to the successions of the bishops The way of those who belong to the Church . . . enables us to see that the faith of all is one and the same . . . mediate(s) the same precepts and preserve(s) the same form of that ordination which belongs to the Church We can recount the number of those who were appointed by the apostles as bishops in the churches, and their successors down to our own time."

In The Apostolic Tradition we are told that the bishop

is to be chosen by the people and ordained by the other bishops [I.ii. 1&2]. It is interesting to note in passing that in X. 1&2 we are told that a confessor who "has been in chains or prison for the Name" does not undergo the laying on of hands for the diaconate or presbyterate, "for he has the office of the presbyterate by his confession."

A basic pattern, then, begins to emerge, with the jurisdiction of the bishop paramount and the consensus of the Church also of importance. But the third century controversy between Cyprian of Carthage and Stephen, Bishop of Rome, over whether heretics and schismatics could validly administer baptism is more to the point for our study. Cyprian held that they could not do so, for to his mind "he who separates himself from the communion of the Church and from the college of Bishops cannot have the authority of a Bishop."² This view will surface again in the women's ordination controversy, but it was not the view which became preeminent in the Church's teaching. It was, rather, the view of Stephen, that schismatics could, in fact, administer valid sacraments, that prevailed.

Though the Council of Nicaea appears to take a more Cyprianic view of ordination in its 16th Canon:

Was torn
from original

"If anyone should dare to steal, as it were, a person who belongs to another [bishop], and to ordain him for his own church, without the permission of the bishop from whom he was withdrawn, the ordination shall be null." [implying the need for re-ordination]₃

it is to Augustine's treatise on baptism against the Donatists that we must look for the most careful early enunciation of the theory that will come to flower in Gratian, Thomas, and the body of later canon law.

Augustine exhibits what Fr. van Beeck calls a "fine sense of paradox . . . when he--in awe of the sovereign power of God overcoming the barriers raised by those who celebrate the sacrament--conceded the validity of the Donatists' Baptisms while maintaining that [they] . . . in the very act of incorporation into Christ's Body, turned against Him . . . by breaking with the community of His Body."⁴ And in Contra Epist. Parmen., II. xii., 28, Augustine adds a judgment on ordinations as well:

"Both Baptism and Orders are Sacraments; and by a kind of consecration both are given to a man, the one when he is baptized and the other when he is ordained; and so, in the Catholic Church, neither may be repeated. From time to time there come from the Donatist part even prelates, who have exchanged their error for the blessing of peace, and are received. But even if it seems desirable that they should

exercise the same officer which they formerly exercised, they are not reordained. But, as in the one case Baptism, so in this case Ordination, remains entire; for the fault was in the schism, now corrected by peace and unity, not in the Sacraments: which are everywhere one and the same." ⁵

Nevertheless, in succeeding centuries there followed a long series of decisions in favor of reordination, a pacific example being the reordination of Chad by the Greek-born Archbishop Theodore. Most of the other cases seem to arise mostly from the desire of one side or another wishing to make a point in an internecine argument, as between rival claimants to the papal throne. Politics more than a careful study of what is at issue in the sacrament of ordination was the ruling motive. In the 11th Century controversy over simony there was a more two-sided approach to the question, St. Peter Damian arguing that ordinations performed under such circumstances were indeed valid. ⁶

Things come a bit closer to a head with the compilation of Gratian's Decretum, which was completed sometime between 1139 and 1159, bringing us solidly into the second period under consideration.

From Gratian to Modern Canon Law

Gratian, though he does not clearly use the terms valid and regular, begins fairly clearly to enunciate the distinction in his effort to make a unified whole of the various traditional canonical approaches to the question of licit ordinations. Orsy divides the principles of presbyteral ordination into four categories: minister, rite, subject, and power conferred. The first is a bishop in his own jurisdiction (including the Pope or an Archbishop). The second is the laying on of hands by both the bishop and those priests in attendance, and the prayer (presumably with the anointing of the hands). The third is a deacon under the bishop's jurisdiction (unless his own bishop has given a brother prelate permission to ordain him), Gratian seconding the Council of Nicaea's prohibition against stealing another bishop's clerics. Finally, it is the power of priesthood that is given by the rite, and also the oversight of the church of the new priest's title. "Gratian insists that all power is given by the ordination, but the exercise of the power depends on the will of the Bishop."⁷ This is a crucial distinction for our purposes, one that was implicit in Augustine, but is here being worked out for the first time in what will become its mature form.

Gratian deals with two sorts of defects in ordination which stem from the bishop: those caused by the ordination without permission of persons outside their jurisdiction, and those caused by the heresy of the bishop. The distinction between the bestowal of power and its exercise must be remembered throughout. In the former case, though the bishop is not within the limits of his power of governance, he does indeed confer the power of priesthood on the ordinand, because he himself received the power to do this at his episcopal consecration and it is irrevocable. The new priest is really and truly a priest. But strong words are used to indicate that he may not use the power given him. Such ordinations are called irritae, nec vires ullas habentes, vacuae, inanae, and prohibitae, though they are real and effectual. The priests ordained in such manner "can be received in their orders: in suis ordinibus recipi possunt. But it is a practical principle, too, that, unless they are received by their own Bishop, they cannot use the power conferred on them."⁸ Here, then, in essence, is the classic example of the valid but irregular ordination. A real bishop has ordained a real priest, but since he has violated the discipline of the Church to do it, the new priest must be received by the legitimate authority, i.e., his own bishop.

Priests ordained by heretical bishops are not reordained, but in their reception by a true Catholic bishop they are granted "the virtue of the Holy Spirit" to use their powers, since the Holy Spirit can only be given within the Body of Christ from which the heretical prelates are sundered.⁹

Not part of the body of canon law itself, but of (to say the least) great influence in this matter, is the Summa Theologica of St. Thomas Aquinas. In Supplementary Question 38 (The Minister of Orders), Article 2 (Whether Heretics and Those Who Are Cut Off From the Church Can Confer Orders), we find that when a bishop returns to the Church from heresy he is not reconsecrated, and since the power to bestow orders is greater than the bishop's own consecration, he therefore retains the power to ordain. Thomas also cites (as did Augustine) the example of baptism. He maintains that the power to bestow both ordination and baptism remains despite defection to heresy, though in his reply to Question 38, Article 2, Objection 3, he states: "Those who are ordained by heretics, although they receive an Order, do not receive the exercise thereof, so as to minister lawfully in their Orders . . ." In other words, Thomas makes the same distinction that Gratian does between power and the exercise of

power: the former is conferred even in this extreme case; the latter is not, and this must be corrected upon reconciliation with the Church.

Thomas also discusses the proper recipient of the sacrament of orders, interestingly enough saying about women's inability to receive ordination only that, "accordingly, since it is not possible in the female sex to signify eminence of degree, for a woman is in the state of subjection, it follows that she cannot receive the sacrament of Order." [Question 39] He also discusses the form, or words and actions of the sacrament, and how they relate to the minister, recipient, and power conferred.

The Council of Trent does not refute either Gratian's opinion or Thomas', rather it elaborates the particulars of the question of ordination in response to the disciplinary problems of the day. For example, Canons 4, 5, and 7, on the sacrament of order, from the twenty-third session of the Council [15 July, 1563]:

"Can. 4. If anyone says that by sacred ordination the Holy Ghost is not imparted and that therefore the bishops say in vain: RECEIVE YE THE HOLY GHOST, or that by it a character is not imprinted, or that he who has once been a priest can again become a layman, let him be anathema.

"Can. 5. If anyone says that the holy unction which the Church uses in ordination is not only not required but is detestable and pernicious, as are also the other ceremonies of order, let him be anathema.

"Can. 7. If anyone says that bishops are not superior to priests, or that they have not the power to confirm and ordain, or that the power which they have is common to them and to priests, or that orders conferred by them without the consent or call of the people or of the secular power are invalid, or that those who have been neither rightly ordained nor sent by ecclesiastical and canonical authority, but come from elsewhere, are lawful ministers of the word and of the sacraments, let him be anathema."

There is also the example of Chapter VIII of the same session, which repeats the prescription that one must be ordained by his own bishop under penalty of suspension at his own bishop's pleasure.

But the primary case in the conciliar documents parallels even more exactly the first of Gratian's examples. Chapter II of the fourteenth session [25 November 1551] goes into great detail about the abuses of the power to ordain by "vagrant" titular bishops who overstep their bounds and ordain those not under their jurisdiction without the permission of a diocesan:

" . . . none of the bishops, therefore, who are called titular, even though they reside or sojourn in a place within no diocese, even if it be exempt, or in a monastery of whatsoever order, may, by

virtue of any privilege granted them for a time, promote those who come to them, or promote or ordain to any sacred or minor orders, or even to the first tonsure, the subject of another bishop, even under the pretext that he is his domestic and companion at table, without the expressed consent of or dimissory letters from that person's own bishop. Those acting contrary to this shall be ipso jure suspended for one year from the exercise of pontifical functions, and the one so promoted shall likewise be suspended from the exercise of the orders as long as his own prelate shall see fit."

Once again we note the distinction between the power received and the exercise of that power. And it is noteworthy that it is the ordinand's own bishop who has the power to permit him to exercise his orders.

The code of canon law has undergone numerous revisions, but the examples cited below are from the revision of 1917, since it is, as regards those points at issue on the subject of presbyteral ordinations, still representative of the height of codification of the Church's law on the subject.

With regard to the proper minister of ordination to the presbyterate, Canon 951 states that he must be a bishop, and that

"A validly consecrated bishop can validly confer all orders from the minor orders to the episcopate inclusively, though he be a heretic, schismatic, or deposed and degraded

from the episcopal dignity, for he nevertheless retains the episcopal character in virtue of which he can validly ordain, provided he observes the essentials of the form of ordination and has the intention to do what the Church does in performing the sacred ordination rites. For this reason the ordinations performed by the schismatic (Orthodox) bishops of the Greek Church, by the Jansenist bishops in Holland, and by the Old Catholics in Germany and Switzerland are considered valid." [emphasis mine]₁₀

Canon 955 states that a bishop is to ordain his own clerics,

"unless he is impeded by some just reason. The law here intends to impose a true obligation, but from the wording of Canon 955, 2, it is evident that there is no question of a grave obligation but of a light one only, because it is stated that any reasonable cause excuses the bishop from the obligation. Such reasonable causes are advanced age, indisposition of mind or body, lack of time, urgency of other affairs and engagements, etc."₁₁

In other words, this requirement is disciplinary only, and does not affect the validity of an ordination performed by a valid bishop outside his jurisdiction.

Of the subject, Canon 968 states that he must be validly baptized. The Roman Church still requires male sex of the candidate for orders, following Irenaeus, Epiphanius, Ambrose, Augustine, and others, who "call it an heretical error to admit women to the office and dignity of the priesthood."₁₂

[How this tradition affects the canonical status of presbyteral ordination in the Episcopal Church will be discussed subsequently.]

Of the rite, Roman canon law requires that the Pontificale Romanum and/or other approved texts are to be used. In brief, the rite consists of the laying on of hands by the bishop, anointing the hands of the candidate, and the delivery of the instruments (a chalice having in it water and wine, and a host on a paten) with the prayer Accipe potestatem.^{12a}

Once again we have, in broad outline, the requirements of proper minister, subject, and rite, the power received being that of the priest to offer the sacrifice of the Mass for the living and the dead. Various details of defect in the rite may be held to invalidate an ordination, the most important of which will be discussed in the following section which deals with the Anglican experience, but, essentially, if one has a valid bishop performing the correct rite on an appropriate subject with the correct intention, the power of priesthood is validly conferred on the ordinand. Other considerations of a disciplinary nature are held to be impediments to the exercise of the power conferred, as we have seen before, but do not render the ordination invalid. Of those

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impediments that do invalidate an ordination but do not directly pertain to this discussion, it has not seemed necessary to treat in so brief an essay.

Conclusions from the Historical Evidence

It is not legitimate to seek for modern definitions in a period that does not even conceive of thinking in those terms. The most one can do is to examine the flow of more or less relevant data, and to see if one can pick up traces of the development of one's topic of particular interest. This is what this essay has tried to do thus far, and it would seem evident that after an initially muddled and controversial period a clear trend of thinking on the ideas of "validity" and "regularity" in ordinations has emerged-- a trend which has been all-pervasive enough to warrant the contention that it has concretized its definitions of these words into technical terms which should be respected as such in an informed discussion of the subject.

As we have seen, before Augustine, the tendency was to have an exclusive view of the Church, emphasizing community and the episcopal authority. Whoever cut himself off from one or the other cut himself out of the Church, outside of which there could be no question of valid sacraments.

Augustine, as had Stephen of Rome, held that even the heretics had valid sacraments though they had turned against Christ and his Church, because they used the same forms as true Christians. In the highly charged political climate of the next few centuries, however, the tendency was once again not to distinguish between invalid and irregular orders but to declare them equally null, though there were disagreements with this view.

Gratian begins to distinguish between the power received in ordination and the authorization to use that power. The former is granted when a validly consecrated bishop, with the correct rite, ordains a fit subject. The latter can be granted only by a bishop within the fold of the Catholic Church. Thus begins the classic distinction between valid and regular orders, and also the idea that it is the prerogative of the bishop to receive into his order (allow him the exercise of its power) a presbyter irregularly ordained. This view is expanded in Thomas Aquinas' Summa Theologica, and by the Council of Trent. The modern Code of Canon Law also agrees with these requirements, adding the requirement of "the intention to do what the Church does in performing the sacred ordination rites."

Therefore, from the examples cited, it appears to be

accurate to say that what is required for a valid ordination is a valid minister, proper intention, the correct rite, and a fit subject. Of the many disciplinary violations which may render an ordination irregular, one of the most common is the ordination of a cleric by a bishop who has neither direct jurisdiction over him nor his proper bishop's permission to perform the rite. It is, however, essentially violations of matters of ecclesiastical jurisdiction and order that cause irregularity, as opposed to grave defect in any of the four requisites which would cause the ordination to be rendered invalid (ordaining an unbaptized person, for example).

II: THE AMERICAN EPISCOPAL EXPERIENCE

A Brief Note on Anglican Orders

One would like very much to be able to avoid the whole controversy over the validity of Anglican orders, but in an essay of this sort some mention of it seems inevitable. I will, however, treat the question both briefly and deliberately inconclusively. It is not the object of my concern in this paper.

The objections to Anglican orders follow a fairly predictable course, beginning with the alleged break in the line of succession at the consecration of Matthew Parker as seventieth Archbishop of Canterbury. That his consecration was done in due form at Lambeth by proper ministers, according to the Edwardine Ordinal of 1552 is really in no doubt (even eyewitness accounts being available) despite the malicious tale that he had been "consecrated" at the Nag's Head Tavern after a meal, by one bishop alone with neither proper words nor ceremonies. The fact that the Ordinal was not legalized officially until 1566 might well create an irregularity, but the succession was in fact intact.

"The four bishops who consecrated Parker represented in their own persons the Latin and the reformed hierarchies. Barlow and Hodgkin had been consecrated in Henry's

reign with the old Pontifical rite; and Scory and Coverdale had been consecrated in 1551 by Pontifical bishops using the rite of the first Ordinal of 1550. The extraordinary pains taken to obtain bishops for this crucial consecration is in marked contrast to the continental reformers' complete lack of interest in the maintenance of episcopal succession. Whatever may have been the motives which dictated the care taken to preserve the succession in England, the fact itself is indisputable--and significant."¹³

The other difficulty here is that Barlow's consecration records are no longer extant. Yet he was bishop in three separate sees in the course of his career, and no one in those years claimed that he was an impostor. Even had he not been a true bishop, he had three co-consecrators in Parker's promotion, against none of whom has this objection been raised. If Apostolic succession were merely a hand-to-head chain of contact from bishop to bishop, then the Anglican succession is most excellently documented.

Then there is the question of the rite used. The 1552 Ordinal does, undeniably, lack the delivery of the instruments and the prayer "Accipe potestatem . . ." considered to be an essential for the validity of the sacrament of presbyteral order. Other difficulties with the rite have also been raised, but this has been the primary example in disallowing the Edwardine Ordinal.

There is also the question of defect of intention, since the idea of offering sacrifice for the living and the dead is the center of "Accipe potestatem" and hence of that school of thought about the meaning of priesthood. Even if one finds that it was not the deliberate intention of the creators of the Ordinal to reject the concept of the sacrificing priesthood, one doubts that it would be easy to prove an undeniably positive intention towards maintaining it, despite the 1897 reply of the Archbishops of Canterbury and York to the condemnatory Bull Apostolicae Curae.

It is not within the scope of this paper to answer, or even to restate others' answers to Apostolicae Curae. An excellent bibliography of the literature up to 1968 is to be found in John Jay Hughes' informative book, Absolutely Null and Utterly Void. One raises the issue at all because it illustrates objections that relate directly to the questions we have seen raised in the development of the concepts of validity and regularity.

To one who begins with the assumption that all Anglican orders, from the abandonment of the use of the Pontifical are invalid, it will seem the utmost foolishness to continue to discuss validity of orders within the context of Anglicanism at all. Anyone of that mind who has stumbled into these pages unawares will be best advised to stop reading here,

for he will not find a justification of Anglican orders as a whole. As far as this investigator can see, there are good arguments on both sides of the question, but one doubts if the problem will ever be solved to everyone's satisfaction by even the best and least biased scholarship. One suspects that crucial links in anyone's proof will be found missing, unrecoverable across centuries because of the different agendas of the periods if not because of loss of concrete data.

Leaping unabashedly, then, over this obstacle because of my concern with a problem of validity that exists within the Episcopal Church de facto no matter what an outsider thinks of our orders, I move on to a consideration of three events in which the questions of validity and/or regularity have confronted the Episcopal Church in the United States. First there is the case of the consecration of our first Bishop, Samuel Seabury. Second is the consecration, in 1862, of Richard Wilmer as Bishop of Alabama. Third and last is the ordination to the priesthood (on July 29, 1974) of eleven women by two retired bishops and one resigned bishop of this Church. This last case I will then consider at some length, dealing particularly with the confusion over the terms "valid" and "regular" manifested by the House of Bishops

in their declaration that these ordinations were "invalid", and the conclusions that may be drawn from applying what we have learned of the classical definitions of validity and regularity.

The Consecration of Bishop Seabury

Samuel Seabury is one of those paradoxical characters who make Anglicanism lovable even when it is most exasperating. Essentially conservative, in the best sense of the word, their very loyalty to the Church forces them into radical action. Boone Porter summed up the aspect of it that thrust Seabury to the fore as the first Bishop of the American Episcopal Church:

"Politically, Bishop Seabury had little use for American independence and even risked his life to oppose it. Spiritually, however, he saw that independence was essential if the American Church was to become a constructive and wholesome part of the Holy Catholic Church of Christ."¹⁴

The desire for the American Episcopate (and opposition to it) was an undercurrent in the life of the American Church well before Seabury's voyage to England in search of consecration. Apart from the pastoral problems of the New World parishes, the difficulty of sending prospective deacons and

priests to England for ordination was considerable, some twenty percent of them, on the average, dying or being lost at sea en route. A bishop, or better yet, three, for American Churchmen would render them independent of England, not to create some new and strange sect, but the better to maintain their traditional worship and polity. It is, therefore, not altogether surprising to find that it was American Loyalists who made the first radical move to secure an American bishop, sending as their choice the convinced Tory, Samuel Seabury, priest-physician, of Connecticut.

Seabury's election cannot remotely be held up as an example of the loving consensus of the Christian community we saw urged by Clement on the Corinthians. No Patriot Churchman had any part in it, and only a handful of loyalists. On March 25, 1783, ten priests (out of fourteen left in the state) met in Woodbury, Connecticut. On their agenda was a reply to William White's 1782 pamphlet "The Case of the Episcopal Churches in the United States Considered," and the election of the man who would go to England to secure in his own person the episcopal order for America. Their election of a prospective bishop was spurred on by White's suggestion for licensing ministers until an indigenous bishop could be had to ordain them. This, they felt rightly, would violate

the character of their Church, and quite possibly carry it into changes from which even the attainment of the episcopate at some future point could not rescue it.

Seabury was not the first choice. The lot, in fact, fell upon Jeremiah Leaming, a highly respected priest who was prevented by age and infirmity from accepting the commission. It was then that Seabury was chosen, both because of his own personal qualifications, and because of his previous contacts among the English clergy. Then, too, there was the hope that his loyalty to England might sway the balance of English opinion in favor of the radical request for an independent bishop. So much a secret was this election that it was over a year before news of it was leaked to any Patriot.

Provided with an impressive array of testimonials, Seabury sailed for England, arriving in early July. Affluence not being a conspicuous characteristic of the Connecticut churches, Seabury had gotten free passage in return for acting as chaplain to an English warship. His expenses for his stay were to come from his own pocket and from friends' loans.

The first obstacle was the Archbishop of Canterbury's dubiousness about the possibility of waiving the oath of allegiance to the Crown. York proved no less discouraging, both bishops being unable to countenance sending a bishop to

an unorganized diocese, without the approval of its civil authority, and with no visible means of support for such a prelate. Then, too, in view of the recent cessation of hostilities, England was reluctant to barge into what was so obviously a domestic problem of the new nation. The best Seabury could produce in the way of state authorization was the legislative act granting equality to all Christian bodies in the state of Connecticut, which at best would not disallow a native episcopate. The objection was raised also that the laity had not been consulted. Difficulties multiplied, hydra-headed.

Negotiations with the non-juring Scots bishops were begun, but hope of an English consecration was not given up until the penultimate moment. Still, Seabury was justifiably irritated at the way he had been left for so long kicking his heels in English ante-rooms:

"I was told that I was precipitate, that I ought to wait, that things might mend. But when, or how they were to mend I was not told. Only general hopes & future expectations were held out to me." 15

Finally the "general hopes & future expectations" were no longer enough, and Seabury's full attention was turned northward to the largely ignored Scottish bishops, relics of

a controversy over royal allegiance by then virtually a dead letter. They were neither precipitate nor unanimous in their acceptance of his credentials, but after personal examination of his character and the nature of his request they decided in favor of his consecration.

The service, on the Twenty-second Sunday after Trinity, 1784, was held at Aberdeen according to English ordination usage, and the consecrators were Bishops Kilgour of Aberdeen (Primus of the Scottish Church), Petrie of Moray, and Skinner, Kilgour's coadjutor. A concordat was also signed between the Scottish Church and that of Connecticut.

But consecration was not going to end Seabury's problem. On his way through England homewards he was met, at best, with polite reserve. He wrote, understandably: "Why should I be censured for obtaining that consecration in Scotland, which political motives, if not party prejudices, prevented me from obtaining here?"¹⁶

At home, while his friends greeted him with rejoicing, the climate of the rest of the Church outside of New England was cool. William White of Philadelphia was, of all the major figures among American Churchmen, the most genuinely interested in achieving a peaceful unity among Episcopalians.

Provoost of New York, however, was outspokenly hostile. Concerns over liturgy and polity also kept the American Church divided.

Provoost and White were consecrated by the English Church in 1787, the way having been opened at last by a special Parliamentary act. Debate, first over the validity of Scottish orders, then over the legitimacy of Seabury's seeking consecration from the Scots, raged. The first objection being overcome, the second became stronger. Finally it came down to an internal wrangle, and at the Convention at Philadelphia in July, 1789 (Provoost being providentially absent with migraine), it was decided that, by unanimous vote "it is the opinion of this Convention, that the consecration of the Right Rev. Dr. Seabury to the Episcopal office is valid." Seabury was then entered as the first in the line of American bishops, by virtue of which fact he subsequently became also the first Presiding Bishop of the Protestant Episcopal Church in the United States of America, since Bishop White's suggestion that the presidency go to the senior Bishop present was the means originally adopted for choosing a Presiding Bishop from the tiny House of Bishops. [White had presided over the original unicameral form of Convention.]

Seabury's consecration illustrates a number of our points on valid and regular orders, and introduces a new dimension to the matter of disciplinary jurisdiction in such cases in the American Church. He was a valid subject for consecration, being a properly ordained priest. His consecrators were in valid episcopal orders, though they were considered irregular by the English Church for essentially secular political reasons. The rite used was that of the English Ordinal which, in English terms was certainly valid. The irregularity stemmed from lack of jurisdiction over the new American Church, and from the irregular position of the consecrators. The new dimension, however, is the precedent set in 1789 for the General Convention to regularize a bishop's orders.

The Consecration of Bishop Wilmer

The second classic case in the history of the American Church is the consecration of Richard Hooker Wilmer as Bishop of Alabama in 1862. The difficulty here was that the eleven southern dioceses were separated from the main body of the Episcopal Church by the Civil War, and therefore in a more or less impossible position vis-à-vis obedience to its canons.

Wilmer was, at the time of his election to succeed Bishop Nicholas Cobbs (who died 11 January 1861), rector of

a parish in his native Virginia. On November 27, 1861, he wrote to his bishop, William Meade, as follows:

"I obey an impulse of my heart in informing you that I have a few days since received information that I was elected to the Episcopate of the Diocese of Alabama. The election was unanimous in both orders, and is forced upon me earnestly by various considerations. I have neither expected nor sought it. It seeks me, and I shall accept it. I do it with many misgivings and many fears. If I knew more of what I have to encounter, I would, I doubt not, fear more than I do"17

The path from election to consecration was not altogether smooth, for at least one potential consecrator objected to the rite being performed, given the jurisdictional vacuum existing because of the fact of separation from the rest of the Church, and also because,

"[as] the Church in the Confederate States has adopted no Canons, I see no law or rule by which he is to be consecrated, and I must therefore decline to take part in what seems to me an irregular transaction. If there were a necessity for its being done . . . at present, that necessity might stand in the place of law. But I can see no such necessity, as Canons can and will be passed at our next meeting, and the diocese might in the meantime be served by the neighboring Bishops. I must therefore reluctantly request not to be named as one of his consecrators."18

*Must / Necessity
must from
law*

That particular irregularity was overcome, and Wilmer was consecrated at Richmond in 1862, by Bishops Meade and Johns of Virginia, and Bishop Elliott of Georgia, all duly consecrated bishops whose orders ante-dated secession. The extraordinary circumstances of the Diocese of Alabama, and the care of the Confederate bishops to follow the valid "form and manner for the ordering of a bishop" even though they were unable to follow what the rest of the Church considered due canonical procedure, was ratified and regularized by the Church in 1865 when Bishop Wilmer's consecration was recognized on the condition that he sign an oath of conformity.

A great opportunity to epitomize the reconciliation of the two portions of the Episcopal Church after the horrors of fratricidal war, the regularization of Wilmer's consecration is also an excellent example of our two points: he was a valid priest and consecrated with the proper rite by the requisite number of validly consecrated bishops--fulfilling, therefore, the necessary provisions for a valid consecration. But due to the unusual status of the Confederate dioceses, he and his consecrators were unable to abide by the disciplinary provisions of the canons of the national Church, thus rendering the consecration irregular, which

deficiency proved readily rectifiable by the Episcopal Church which received him into his order at the close of the war.

The Ordination of the "Philadelphia Eleven"

On July 29, 1974, in the Church of the Advocate, Philadelphia, eleven deacons were ordained to the priesthood in the familiar 1928 Prayer Book rite by three bishops, with a fourth assisting but not ordaining. The eleven, the Revs. Merrill Bittner, Alla Bozarth-Campbell, Alison Cheek, Emily Hewitt, Carter Heyward, Suzanne Hiatt, Marie Moorefield, Jeannette Piccard, Betty Schiess, Katrina Swanson, and Nancy Wittig, were all regularly and validly ordained deacons of the Episcopal Church. The ordaining Bishops, the Right Revs. Daniel Corrigan, Robert DeWitt, and Edward R. Welles, II, were all regularly and validly consecrated bishops of the same Church. The fourth bishop, the only current diocesan among them, was Bishop Ramos of Costa Rica.

In no other ordination in the history of our Church was the intention of the ordaining bishops more explicitly and publicly stated. In an open letter to the Church, they said: "On Monday, July 29, 1974, the Feasts of Sts. Mary

and Martha, God willing, we intend to ordain to the sacred priesthood some several women deacons. . . ." ¹⁹

On the basis of the examples cited in the first part of this paper, we concluded that what is essential to a valid ordination is the proper minister, intention, rite, and subject. Of the ministers involved in the ordination of July 29th one can state unequivocally that, in the sphere of Anglican polity, their orders and the validity thereof are a matter of record. One only has to examine the list of American bishops and their consecrators to find all three in their proper order by date of consecration. Given this fact, and given the traditional ruling of the Church that a valid bishop retains his power to ordain even though he is without a diocese, heretical, or schismatic, the fact that Bishops Welles and Corrigan were retired, and Bishop DeWitt had resigned his see could not be said to have any effect on the validity of ordinations performed by them and fulfilling the other three provisions we have established.

The stated intention of the Bishops was to ordain these deacons "to the sacred priesthood." The wording of this open letter and of subsequent statements from both the bishops and the women involved all are unequivocal in repeating directly and by implication that the intention

of all concerned was "to do what the Church does" in ordaining all its priests. The fact that the ordinands were all women does not obscure, though it adds to, this central point.

Even Episcopalians who are most categorically opposed to current liturgical reforms could have no quarrel with the rite used, since it was taken directly from the 1928 American Book of Common Prayer, the normative service book of the American Church until the final adoption of the new Draft Proposal Book of Common Prayer.

Finally, we come to the question of the subjects of the ordination. All were validly ordained deacons, of the appropriate age and ministerial qualifications. None had the consent of their diocesan Standing Committees, because this was not available to them because of the state of the women's ordination question in the canon law of the American Church, but this is a disciplinary question rather than one which affects the essential validity of the rite. All had been deacons for longer than the requisite canonical period and, had they been men, would have already been advanced to the presbyterate. Further, since none of the ordaining bishops were diocesans and since the deacons' bishops had not asked these prelates to ordain their respective charges,

there existed a jurisdictional irregularity, which was, however, quite openly admitted by all the participants. As we have seen, such jurisdictional irregularities have not been uncommon in the development of Church law, but have been seen expressly as irregularities in the mainstream of canonical legislation, not as invalidating impediments.

The most obvious difficulty about the eleven as recipients of presbyteral orders is their sex. Without rehearsing the by now tired arguments pro and con on the subject of women's ordination, is there a way to approach the question at all? I believe that Fr. Frans Jozef van Beeck, S.J., has made an important point in regard to the issue of female sex and the validity of the Philadelphia ordinations, so I take the liberty of quoting him at length:

"What kind of evidence do we have to look for? Not evidence that would establish that the Episcopal Church in the United States has canonical provisions that prohibit the ordination of women. Nobody denies that it has, but those provisions only make such ordinations irregular in the disciplinary or moral sense. We need evidence of the kind that bears upon the canonical shape; if it can be shown that the traditional canonical shape ad validitatem in regard to the sex of the ordinands to the presbyterate is no longer accepted as entirely compelling, and if it can be shown that this non-acceptance has formal hierarchical endorsement, then the case for non-validity is no longer watertight.

Fr.
Van Beeck

12. To make assurance doubly sure: it is not sufficient, to make the case for validity of the Philadelphia ordinations, to allege compelling theological reasons why women are capable of receiving the order of the presbyterate, for it is the potestas ligandi of the Church that determines the validity of sacramental celebrations, not the theologians, nor even the sensus fidelium. However, if this potestas ligandi is not to degenerate into the tyranny of tradition or the insolence of office, it must have a healthy awareness of the provisionality of all canonical provisions, including those provisions that constitute the five criteria. The question, therefore, is: Has the hierarchy of the Episcopal Church shown, either verbally or in their behavior or both, that the ancient thesis subjectum ordinationis est solus mas is now considered, no longer as going to the core of the sacrament, but merely as pertaining to the current order of Church discipline?

13. I suggest that it has. The factual admission of women to the ordained diaconate suggests that their exclusion from the priesthood and the episcopate is based on discipline, not incapacity. I am not aware that the Episcopal Church, or any member-Church in the Anglican Communion has qualified its full communion with the diocese of Hong-Kong, where women exercise the priestly ministry. I am not aware that the intercommunion with the Church of Sweden has been qualified on account of its having ordained women to the priesthood; I understand that the Swedish women-priests cannot celebrate in the Anglican Church in the British Isles, but this must obviously be interpreted as a straightforward disciplinary measure dictated by good taste. I am not aware that the Episcopal Church has protested the decision, made by the Anglican Church of Canada, that

women are capable of priestly ordination. I suggest that the close votes on admitting women to the ministry in the Episcopal Church in the United States become intelligible only if construed as an awareness in the leadership of the Church that it is discipline, not essential incapacity, that keeps women out of the priestly and episcopal ministries.

If I may be irreverent in the interest of clarity: if the Bishop of Hong-Kong had ordained, not women, but subjects clearly incapable of ordination, such as unbaptized men that did not believe but were good marriage counselors or investment advisers, would the Episcopal Church have stayed in full communion?

At this point I must express some amazement. Bishop Vogel argues his case entirely - and unconvincingly, in my opinion - on the grounds of intention and ministry; the collegiality of the ministry demands, he says, that we conclude that those who act against it cannot have the intention of doing what the Church does. But is it not obvious that the crucial issue is that the ordination was conferred upon women? The episcopally governed Churches have always known off-beat bishops (Novatian!), but precious few of them have ordained, or attempted to ordain, women. Bishop Vogel does not argue on the basis of that fact; he never even alludes to it. No, this absence of any mention whatsoever of the crucial issue is amazing; it strengthens my contentions that the argument in favor of invalidity, sanctioned by the ensuing vote, was based solely (and wrongly, in my opinion) on 'episcopal responsibility to Constitution and Canon.' Canonical disobedience, however, need not result in invalidity of sacraments, although it may. But psychologically speaking, the omission of any reference to the central issue strikes me as an argumentum e silentio in favor of women's essential capacity to be ordained to the priesthood and the episcopate." 20

For many to
be admitted to
ministry is a
proper intention

There remains, however, the question of what to do about the manifest irregularity of the Philadelphia ordinations. In the cases of Seabury and Wilmer, it was the General Convention of the national Church which regularized their consecrations. And this is the logical authority to turn to in the case of a bishop's orders, because it is the only authority the Episcopal Church has that ranks higher than diocesan authority. If we had Archbishops in the Episcopal Church, perhaps the archprelate of the bishop's province would be the logical authority to which he might turn to have his orders regularized. Certainly the House of Bishops has power to discipline its members--witness the current proceedings against the bishops involved in the Philadelphia ordinations--but that is a different question.

The crucial question arising from the conclusion that the Philadelphia ordinations are valid but irregular, in the traditional sense of the terms, is who then has the power to receive these eleven priests into their order? To a man the relevant diocesan bishops have disclaimed capacity to do so. But have they been correct in doing so? It is a moot point. Our classic cases of the reception of the irregularly ordained into their orders both have to do with bishops, whose higher authority is obviously either the House

of Bishops or General Convention as a whole. We must not make the facile assumption, however, that the proper authority to receive an irregular prelate is the proper authority to receive an irregular presbyter. To establish who this latter authority most properly should be, let us examine the evidence of classical canonical practice and any seemingly relevant data from our own canons. According to Title III, Canon 12, Sec. 5 (a), a minister from a Church outside the Anglican communion applies in due form for acceptance by a bishop, and

"Thereafter, the Bishop, being satisfied of such Minister's theological attainments and soundness in the faith, may

- (1) Receive him into the Diocese as a Deacon of this Church, and, no sooner than four months thereafter, as a Priest, if he has already been ordained by a Bishop in the historic succession; . . ."

This could certainly be construed as the power to receive a validly ordained cleric into his order, even with the stipulation that he must serve for at least four months as a deacon.

Then, too, there is the evidence previously cited from Augustine (by implication), from Gratian, from Thomas, from the Council of Trent, and from modern Roman canon law that validly but irregularly ordained priests may in fact be

reconciled to the Church and received into their orders, the proper authority to do this being the bishop, as stated in the above quotations from Gratian and from Trent, and as also to be found in these other sources. Obviously it is within each bishop's power to decide whether or not he will act in this matter, and if he will, in what manner. I am, however, persuaded that, given the precedent of Title III, Canon 12, Sec. 5 (a) and 5 (a).1., and the clear tradition of episcopal responsibility for the reconciliation and regularization of irregularly ordained presbyters, that the eight diocesans under whose jurisdiction the eleven women ordained in Philadelphia properly come have the authority to regularize the status of these women priests without recourse to any higher authority. They may see fit, though, as provided for in Canon 12, to require that the women make proper application for approval by the Standing Committee of their dioceses.

The question is a difficult one, less because of the historical evidence than because of the emotional freight with which the ordination of women to the presbyterate is loaded. My conclusions are just that--my own--though I hope that others may find them persuasive.

In closing, I find myself echoing the words of the Rev. Henry H. Rightor in his letter of July 25, 1974, to Bishop Hall of Virginia:

"The approach I urge on you is that of the leaders of our Church toward the consecrations of Bishop Seabury of Connecticut and Bishop Wilmer of Alabama. The leadership of the Protestant Episcopal Church in the U.S.A., while admitting that both consecrations were 'irregular', to say the least, rejoiced at the motives that led to the consecrations; and, with the exception of Bishop Provoost in the Seabury Case, they eagerly found a way to accommodate both Bishops. In the process, they also accommodated all the Episcopalians in New England and in the Confederate Dioceses who were, in effect, represented by Bishop Seabury and Bishop Wilmer.

The history books refer to the actions of our leaders in 1789 and 1865 as ecclesiastical 'statesmanship'. Their actions could also be called acts of 'reconciliation'. The irregularities they accommodated to were not picayune. On the other hand, by yielding in 1789, our leaders prevented the departure of the New England Episcopalians with Bishop Seabury to form a separate Church; and by yielding in 1865 they insured the return of the Confederate Dioceses along with Bishop Wilmer, whom the southerners had consecrated. One can only hope that our leadership today will also be led to rejoice at the motives which are leading to the ordination of eleven committed, competent women deacons to a fuller ministry; one can even hope that our leadership will also go eagerly to work at national, diocesan and parish levels on accommodating to the irregularities of their ordination. In so doing they will also be accommodating the millions whom they represent in their struggle for wider opportunities for women in the mission and ministry of our Church."

FOOTNOTES

1. Ignatius, Epistle to the Trallians, II.
2. B.J. Kidd, "Validity: Name and Thing," (Theology reprint, London, 1937) p.4.
3. Kidd, p.4.
4. Frans Jozef van Beeck, S.J., "Invalid or Merely Irregular?" (Unpublished speech, 1974) p.5.
5. Kidd, p.3.
6. Kidd, p.6.
7. Ladislaus Orsy, S.J., "Sacred Ordinations in Gratian's Decretum," Heythrop Journal, Vol. III, No. 2, April, 1962. p.160.
8. Ladislaus Orsy, S.J., "Irregular Ordinations in Gratian's Decretum," Heythrop Journal, Vol. IV, No. 2, April, 1963, p.165.
9. Orsy, "Irregular Ordinations. . ." pp. 166-171.
10. Stanislaus Woywod, O.F.M., A Practical Commentary on the Code of Canon Law (New York, 1948) p.558.
11. Woywod, p.564.
12. Woywod, p.578.
- 12a. Woywod, p.629.
13. Bruce E. Steiner, Samuel Seabury: A Study in the High Church Tradition (Oberlin, Ohio, 1971) p. 17.
14. H. Boone Porter, "Samuel Seabury: Bishop in a New Nation" (Pamphlet, New York, 1962) p.4.
15. Steiner, p.212.
16. Steiner, p.220.
17. Marcus Benjamin, "The Consecration of Bishop Wilmer of Alabama in 1862" (Pamphlet, Philadelphia, 1927) p.2.
18. Benjamin, p.3.
19. Daniel Corrigan, Robert DeWitt, and Edward R. Welles, II, "An Open Letter" (Unpublished, 1974)
20. van Beeck, pp. 11-13.
21. Henry H. Rightor, Letter to the Right Rev. Robert Bruce Hall (Unpublished, July 25, 1974) p.1.

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